DEC 15 1

MICHAEL RODAK,

No. 80-827

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT SCANLON, Secretary of Education of the Commonwealth of Pennsylvania,

Petitioner

v.

PATRICIA SUE BATTLE, ET AL.,
NATALIE BERNARD, ET AL.,
and
PATRICIA and JOHN ARMSTRONG, ET AL.,

Respondents

BRIEF OF RESPONDENTS ARMSTRONG, *et al.* IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals err in holding that the Education for All Handicapped Children Act prevents the Pennsylvania Department of Education and local school districts from arbitrarily limiting the special education programs of all handicapped children in Pennsylvania to 180 days per year, without regard to the individualized instructional needs of those students?

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I. STATEMENT OF THE CASE

In January, 1978, three severely handicapped youngsters and their parents commenced a class action litigation, *Armstrong v. Kline*, in the United States District Court for the Eastern District of Pennsylvania, against the Secretary of the Pennsylvania Department of Education, the Philadelphia School District, and relevant officials of those agencies.[1] (These officials and

1. At approximately the same time, two other cases were filed in that Court, *Battle v. Commonwealth* and *Bernard v. Common-*

agencies are collectively referred to as "defendants." Secretary of Education Scanlon, sole petitioner herein, shall be referred to as "Petitioner.") Plaintiffs challenged defendants' policy of refusing to provide or insure the provision of programs of special education and related services which exceeded 180 days per year to any handicapped child in Pennsylvania as violative of plaintiffs' rights under, *inter alia*, the Education for All Handicapped Children Act, 20 U.S.C. §§1401, *et seq.* (1976) (hereinafter "P.L. 94-142" or "the Act").[2]

Plaintiffs also challenged defendants' companion policy of refusing to permit handicapped youngsters and their parents to utilize existing and mandated evaluation, hearing and appeal procedures to establish their need for, and thus obtain, special education programming in excess of 180 days per year. The relief sought by plaintiffs was the invalidation of these inflexible policies.

In March, 1979, a trial was held, and on June 21, 1979, an Opinion and Order were issued by the District

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NOTE 1 — *(Continued)*.

wealth, which raised essentially the same issues. All three cases were assigned to the same Judge and were consolidated for trial and decision on their overlapping declaratory and injunctive issues. By Order dated February 21, 1979, *Armstrong v. Kline* was certified as a class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2). *Armstrong v. Kline*, 476 F. Supp. 583, 586 (E.D. Pa. 1979) [hereinafter "*Armstrong*"]; Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, submitted by Robert Scanlon, 4a-5a. (References to that Appendix will hereinafter appear in brackets [] and the Petition of Robert Scanlon will be referred to as "Petition.")

2. Plaintiffs also alleged that defendants' policies violated §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, state law, and the equal protection and due process clauses of the United States Constitution. Both the District Court and the Court of Appeals expressly refrained from ruling on any of plaintiffs' claims other than the claim arising under P.L. 94-142. *Armstrong*, at 600, n. 4 [39a]; *Battle v. Commonwealth*, Nos. 79-2158, 79-2188-90, 79-2568-70 (3rd Cir. July 15, 1980) (hereinafter "*Battle*"), Slip Op. at 7, ¶4 [87a-88a].

Court. *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979) [1a-54a]. In that Opinion the District Court made extensive factual findings regarding the learning characteristics of named handicapped plaintiffs and other members of the plaintiff class.

The Court found that the nature and severity of named plaintiffs' handicapping conditions — autism, profound mental retardation and severe emotional disturbance — affected the way they acquired and retained skills and behaviors and made them extremely vulnerable to breaks in their special education programming. In particular, the Court found that when these children's highly structured programs were interrupted, they lost much, and in some cases all, of what they had learned during the 180 days of programming which was provided. Moreover, after formal programming resumed, plaintiffs required a disproportionately long time to recoup these losses, sometimes taking more than nine months to return to their pre-break level. *Armstrong*, at 597 [30a]. As a result of this treadmill of regression and recoupment, these children spent much of their programming time relearning the same skills and behaviors, and were thus prevented from making reasonable progress towards the educational goals set for them by the educators, parents, and other persons who worked with them. *Armstrong*, at 596-599 [28a-33a].

The District Court recognized that named handicapped plaintiffs' extreme susceptibility to regression and limited recoupment capacity are not characteristic of the learning patterns of non-handicapped children, or even of most handicapped youngsters who have been diagnosed as having the same generic handicapping conditions. The Court did find, however, that named plaintiffs and certain other severely handicapped youngsters do demonstrate these learning patterns and problems and that defendants' "180 day rule" precluded consideration and accomodation of these children's educational needs. *Armstrong*, at 597 [30a-31a].

Finally, recognizing that "each handicapped child has unique needs and will respond in his or her own way to a given situation," the Court refused to substitute its own inflexible rule for that of the defendants. *Armstrong*, at 599 [37a]. Instead, the Court found that decisions regarding which children were eligible for extended programming, and the type and length of the program required, can only be made "on an individual basis by those familiar with the child." *Armstrong*, at 600 [37a].

The Court then proceeded to the legal issue in the case. It was and is undisputed that the Pennsylvania Department of Education and the Philadelphia School District are voluntary recipients of federal financial assistance under P.L. 94-142 and that they are therefore obligated to provide all handicapped children within their jurisdiction with "free appropriate public education[s]" designed to "meet [each child's] unique needs." *Armstrong*, at 602 [43a] [Petition at 11]. See also 20 U.S.C. §1412(1) [149a-153a], §1414. The question before the District Court was whether defendants' 180 day rule denied handicapped plaintiffs their right to "appropriate" education programs. The Court concluded that it did. *Armstrong*, at 605 [50a].

In its June 21, 1979 Order, the District Court enjoined defendants to desist from application of the inflexible 180 day policy and to provide special education programming in excess of 180 days per year to all handicapped youngsters who require such programming. In subsequent Remedial Orders, the Court granted specific relief to the named plaintiffs and set out the parameters for providing relief to the members of the plaintiff class. [55a-76a].

Defendants filed appeals from these injunctive orders to the United States Court of Appeals for the Third Circuit, but on appeal no party challenged any of the factual findings of the District Court. On July 15, 1980, the Court of Appeals issued its decision, *sub nom. Battle v.*

Commonwealth, Nos. 79-2158, 79-2188-90, 79-2568-70 (3rd Cir. July 15, 1980) [80a-124a]. The panel was unanimous in affirming the central holding of the Court below.

> The Education for All Handicapped Children Act, 20 U.S.C. §§1401-1420 (1976), requires that every state which elects to receive federal assistance under the Act provide all handicapped children with the right to a "free appropriate public education," *id.* §1412, and establishes detailed procedures for implementing that right. *Id.* §1415. The Commonwealth of Pennsylvania, a recipient of aid under the Act, has established an administrative policy, which sets a limit of 180 days of instruction per year for all children, handicapped or not. We are called upon, in this case of first impression, to examine the scope and purpose of this recent act and to decide whether Pennsylvania's policy and the statute may coexist. We conclude that they may not. *Battle*, at 5, ¶1 [85a].

In its analysis, the Circuit Court focused on the express language of the Act.

> At the core of the Act is a detailed procedure for determining the contours of the free appropriate public education to be delivered to each child. 20 U.S.C. §1415 (1976). We believe that these procedural safeguards require individual attention to the needs of each handicapped child. The strongest statement of this requirement is the statutory mandate of individualized education programs. The IEP is the statutory vehicle for formulating the educational objectives and the educational program for each child. We consider it most persuasive that at this fundamental point in the educational decision making process, the statute requires consideration of each child.

> Nor do the later procedures required by the Act depart from this emphasis. The appeal prescribed by the Act is an appeal from the decision reflected in IEP. *See* 20 U.S.C. §1415(b)(2) (1976). Moreover, as difficult as it is to define the scope of the "unique needs" which must be met by special education, *see id.* §1401(16), there can be little doubt that by requiring attention to "unique needs," the Act demands that special education be tailored to the individual. *Battle*, at 25, ¶32 [107a]. (non-statutory citations omitted).

The Court of Appeals concluded that defendants' inflexible policy precluded consideration of plaintiffs' individual learning characteristics, which at this stage were undisputed, and of the educational consequences to these handicapped youngsters of limiting their programs to 180 days per year. Thus, the policy was found to be in violation of the Act.

> We believe the inflexibility of the defendants' policy of refusing to provide more than 180 days of education to be incompatible with the Act's emphasis on the individual. Rather than ascertaining the reasonable educational goals, and establishing a reasonable program to attain those goals, the 180 day rule imposes with rigid certainty a program restriction which may be wholly inappropriate to the child's educational objectives. This, the Act will not permit. *Battle*, at 26, ¶34 [108a].

It is this holding which defendant Scanlon seeks to have reviewed by this Court.[3]

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3. Although it reached the same conclusion regarding the legality of defendants' 180 day rule, the reasoning of the Court of Appeals differed from that of the District Court. Therefore, the Appellant Court remanded the case to the District Court to consider, upon motion of a party, whether any of its remedial orders should be modified. *Battle*, at 28,¶38 [110a].

II. SUMMARY OF ARGUMENT

While this litigation is of exceptional importance to those handicapped youngsters who are receiving needed programming as a result of this decision, Petitioner has asserted nothing to support his contention that the case raises a legal question of sufficient public importance to warrant review by this Court. U.S. Sup. Ct. Rule 17.1(c). In fact, the case presents a narrow issue of law which was properly decided by the Court below.[4]

The Education for All Handicapped Children Act, P.L. 94-142, establishes a program of cooperative federalism which requires state and local educational agencies which receive federal financial assistance under the Act to provide all handicapped youngsters in their jurisdictions with "free appropriate public education[s]" and certain procedural safeguards. Since P.L. 94-142 covers children with many different handicapping conditions and learning characteristics, the Act does not define with specificity the special education program which is appropriate for each child.

Instead, the Act sets out a process by which educators, parents, and others who work with a handicapped child must formulate the education program which meets his or her "unique needs." Decisions regarding the format and content of each child's program are then

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NOTE 3 — *(Continued)*

The difference in analysis between the two courts is described at length in the Petition at 7-10. However, this difference is not relevant to the Court of Appeals' holding which Petitioner now asks the Court to review. The Opinion and Order of the District Court on remand, dated October 27, 1980, improperly included in Petitioner's Appendix at 131a-139a, has been separately appealed and is presently pending before the United States Court of Appeals for the Third Circuit.

4. Petitioner does not assert that the decision of the Court of Appeals in *Battle* is in conflict with a decision of any other Court of Appeals or District Court, or that it is in conflict with any decision of this Court.

subject to review through impartial hearing and review procedures.

The Court of Appeals in *Battle* correctly held that defendants' absolute bar on special education programming in excess of 180 days per year ignored this mandated process and prevented the formulation of education programs for plaintiffs which were "tailored" to their individualized instructional needs. In enforcing the express language of the Act, the Court of Appeals also took care to preserve state and local educational agencies' authority in a manner which was compatible with insuring plaintiffs' rights under the Act.

Contrary to the assertions of *Amicus* Pennsylvania School Boards Association (hereinafter "*Amicus*"), review by this Court of the *Battle* decision will not aid lower courts' interpretation of this new Act outside the narrow legal issue presented by this case — the validity of defendants' 180 day rule. The Court of Appeals' decision did not define the format or content of the special education programs required under the Act for plaintiffs or any other handicapped children. Rather, it merely provided plaintiffs and members of the plaintiff class with access to the existing, locally based procedures by which, in the first instance, such decisions must be made and reviewed.

The Petition for Certiorari should therefore be denied.

III. ARGUMENT

THIS CASE DOES NOT PRESENT AN ISSUE OF SUFFICIENT PUBLIC IMPORTANCE TO WARRANT GRANTING THE PETITION FOR CERTIORARI

In the early 1970's, the United States Congress first began to address seriously the needs of this country's handicapped population. The Rehabilitation Act of 1973 was enacted, which provided, at §504, that no "otherwise qualified handicapped individual . . . shall be ex-

cluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance." 29 U.S.C. §794 (1976 & Supp. II of 1978).

In 1975, expressing specific concern for the plight of handicapped children and young adults, Congress promulgated P.L. 94-142, a far more detailed enactment which provides federal financial assistance to all local and state educational agencies which agree to provide certain educational services and procedural safeguards to their handicapped school-aged residents. Federal statutes which impose such conditions on the receipt of federal funds have frequently been upheld by this Court.

> Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives. *Fullilove v. Klutznick*, U.S. , 100 S.Ct. 2758, 2772 (1980).

See also *Lau v. Nichols*, 414 U.S. 563, 569 (1974).

The congressional objectives which P.L. 94-142 is intended to address are reflected in the Act's Statement of Purpose:

> It is the purpose of this Act to assure that all handicapped children have available to them . . . *a free appropriate public education which emphasizes special education and related services designed to meet their unique needs*, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children and to assess and assure the effectiveness of efforts to educate handicapped children. 20 U.S.C. §1401(c) *note* (emphasis added).

In order to achieve these purposes, P.L. 94-142 requires all state and local educational agencies which receive funds under the Act to provide all handicapped children in their jurisdictions with "free appropriate public education[s]."[5] 20 U.S.C. §1412(1) [149a]. Since the Act applies to children with a vast variety of handicapping conditions and an even wider array of learning characteristics, Congress did not attempt to define with specificity the special education program which was "appropriate" for each. Instead the Act established a framework within which those who know the child best will make these individualized educational decisions. *Battle*, at 25-26, ¶33 [107a-108a].

A "free appropriate public education" is

> [S]pecial education and related services which . . . (D) *are provided in conformity with the individualized education program* required under section 1414(a)(5) of this title. 20 U.S.C. §1401(18) [141a] (emphasis added).

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5. As both courts below recognized, it is this term and its related statutory mandates, not plaintiffs' rights under the equal protection clause of the United States Constitution, which presents the legal issue in this case. Moreover, even under the equal protection clause, and certainly under P.L. 94-142, "equal educational opportunity" for the handicapped is not insured merely by providing them with the same programs and services as are offered to the non-handicapped.

> Defendants cannot defend their 180 day rule by asserting that it is applied equally to handicapped as well as non-handicapped children . . . It is apparent that Congress recognized that "equal" services does not always provide handicapped children with an "appropriate education" and, thus by requiring defendants to meet the handicapped child's "unique needs," demanded that, in certain instances, more be provided. *Armstrong* at 605 [49a-50a].

Special Education is defined as

> [S]pecially designed instruction, at no cost to parents or guardians, *to meet the unique needs of a handicapped child*, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. 20 U.S.C. §1401(16) [140a-141a].

Finally,

> The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardians of such child, and whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date of initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. 20 U.S.C. §1401(19) [141a-142a].

If agreement cannot be reached among the parties as to the specific content of this blueprint for a handicapped child's education program, the parent can contest the IEP, in whole or in part, through a hearing and administrative review procedure established and maintained by the state and local educational agencies. 20 U.S.C. §1415(a) [158a-159a].

Because of defendants' 180 day rule, before the rulings in *Armstrong* and *Battle*, the regression/recoupment problem of handicapped plaintiffs and its impact on their educational progress could not be considered at IEP conferences or reviewed through the mandated hearing and appeal procedures. The decisions of the *Armstrong* and *Battle* Courts did not take from state and local educational agencies their authority to consider educational needs and make legitimate programmatic decisions. To the contrary, the lower Courts merely mandated that locally based systems could not, by administrative fiat, absolutely refuse to consider the particular educational needs of certain severely handicapped youngsters, and thus offer these children a program which was less than "appropriate."[6] This result is a necessary concomitant of the congressional mandate that *every* handicapped child must receive a program of "specialized instruction. . .to meet [the child's] unique needs." To have held otherwise would have eviscerated the key provision of the Act.

Thus, the decision of the Court in *Battle* does not, as Petitioner contends, improperly limit the role of state and local agencies in educational decision-making, but rather enhances that role. Moreover, as the *Battle* Court recognized, recipients of P.L. 94-142 assistance

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6. Indeed, the flexibility allowed the state and local educational agencies in meeting the mandates of the Act and of the *Battle* decision is reflected in the types of extended programs provided by Pennsylvania's educational agencies during Summer, 1980. Compliance data submitted to the District Court in June, 1980, by Petitioner Scanlon pursuant to ¶8(d) that Court's Remedial Order #2 [67a], indicated that a variety of models were used. Several school districts, for instance, provided eligible students with a five hour per day/four day per week/six week program. In other districts, children received programs utilizing a combination of instruction in the home and school-based sessions or programs operated jointly by school districts and the state mental health/mental retardation system.

are free, in the first instance, to establish their own educational policies, standards, and goals, particularly when such decisions involve the allocation of fiscal resources.[7] *Battle*, at 21, ¶25 [102a-103a].

However, the Court also recognized that state and local educational agencies, as recipients of federal financial assistance under the Act, have undertaken certain obligations, including the provision of free appropriate public educations to their handicapped school-aged residents and the implementation of procedures designed to guarantee the provision of such educations. Petitioner and the other defendants in this case do not have the "authority" to continue to receive funds under the Act while failing to meet its central requirements.

Finally, review of the *Battle*, decision by this Court will not, as *Amicus* suggests, clarify issues other than the narrow legal issue presented by this case — the legality of inflexible bars to the provision of individualized special education programs. The Court of Appeals in *Battle* did not attempt to define the substantive format or content of the educational programs which are appropriate and thus required for plaintiffs or any other children. Instead, the Appellate Court focused on and enforced the Act's procedures for educational decision-making and made those procedures available to plaintiff handicapped youngsters. See *Battle*, at 33-35 [117a-119a] (Sloviter, J., dissenting in part on the grounds that the majority refused to provide a minimum definition of the substantive content of the "free appropriate public education" requirement).

The expressly limited scope of the Court of Appeals decision makes it particularly inappropriate for this Court to grant a Writ of Certiorari in this case.

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7. It is important to note that while P.L. 94-142 was clearly intended, in part, to supplement state and local funding efforts, it was never intended to supplant them. See, e.g., formula for appropriations in 20 U.S.C. §1411 [142a-149a]. Moreover, contrary to the

IV. CONCLUSION

For the foregoing reasons, the Petition for Certiorari in this case should be denied.

Respectfully submitted,

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NOTE 7 — *(Continued)*
unsupported, not of record, assertions of *Amicus*, implementation of the decisions of the courts below has not resulted in large numbers of children being determined eligible for extended school year programming. See *Amicus* brief at 3-4.

Data submitted to the District Court by Secretary Scanlon in May, 1980, indicated that fewer than 2,100 handicapped youngsters had been identified as in need of and eligible for extended school year programming — less than 1% of the children receiving special education services in Pennsylvania as of that date. All costs of providing extended programming for those youngsters were paid with excess federal funds provided under P.L. 94-142.